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ATTORNEY FOR DEFENDANT ACE AMERICAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

STILLWATER MINING
COMPANY,

Plaintiff,

vs.

AIG CLAIMS, INC.; NATIONAL
UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.;
ACE AMERICAN INSURANCE
COMPANY; AND QBE
INSURANCE CORPORATION,

Defendants.

Cause No.

**DEFENDANTS NATIONAL
UNION, ACE AMERICAN,
AND QBE'S NOTICE OF
REMOVAL**

Defendants, National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”), ACE American Insurance Company (“ACE American”), and QBE Insurance Corporation (“QBE”), pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 hereby give notice of removal of the civil action captioned *Stillwater Mining Company v. AIG Claims, Inc. et al.*, Cause No. DV 20-117 (the “State Court Action”) from the Twenty-Second Judicial District Court in Stillwater County, Montana to the United States District Court for the District of Montana based on diversity of citizenship, and in support state as follows:

1. On or about December 21, 2020, Plaintiff, Stillwater Mining Company (“Stillwater”) commenced the State Court Action by filing a Complaint in the Twenty-Second Judicial District Court in Stillwater County, Montana against Defendants National Union, AIG Claims, Inc. (“AIG Claims”), ACE American, and QBE.

2. Stillwater alleges claims for breach of the duty to defend, breach of contract, violations of the Unfair Trade Practice Act, § 33-18-201, et seq., MCA (“UTPA”), and for attorneys’ fees, arising out of Defendants’ alleged duty to defend and indemnify Stillwater for allegedly covered claims under National Union’s Primary Policy No. 01-356-49-63, to which excess policies issued by ACE American and QBE follow form. True and correct copies of the National Union, ACE American, and QBE policies, which are incorporated by reference into the

Complaint, are attached hereto as Exhibits 1-3. Stillwater seeks coverage for defense costs and amounts paid in relation to settlements of an underlying appraisal action in the Delaware Court of Chancery.

3. National Union's registered agent accepted service on behalf of National Union of the Summons and Complaint on December 23, 2020.

4. ACE American's registered agent accepted service on behalf of ACE American of the Summons and Complaint on December 29, 2020.

5. QBE's registered agent accepted service on behalf of QBE of the Summons and Complaint on December 23, 2020.

6. A true and correct copy of the Notices of Service of Process, Summons, and Complaint are attached hereto as Exhibit 4. The documents attached in Exhibit 4 constitute all pleadings, process, and orders served on and by National Union, ACE American, and QBE in the Twenty-Second Judicial District Court in Stillwater County, Montana pursuant to 28 U.S.C. § 1446(a).

7. National Union, ACE American, and QBE timely file this Notice of Removal within thirty days from the date of service on National Union of the Summons and Complaint pursuant to 28 U.S.C. § 1446(b).

8. Under 28 U.S.C. §§ 1441(a) and 1446(a), venue is proper in this Court because the United States District Court for the District of Montana, embraces Stillwater County, Montana, where the State Court Action was pending.

9. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(a) because there exists complete diversity of citizenship as to the properly joined parties and the amount in controversy exceeds the jurisdictional threshold amount contained in 28 U.S.C. § 1332(a).

10. The Complaint alleges that plaintiff Stillwater is a corporation formed under the laws of the state of Delaware with its principal place of business in Stillwater County, Montana.

11. Defendant National Union is a corporation formed under the laws of the state of Pennsylvania, having its principal place of business and headquarters in New York, and is a citizen of both Pennsylvania and New York.

12. Defendant AIG Claims is a corporation formed under the laws of the state of Delaware, having its principal place of business and headquarters in New York, and is a citizen of both Delaware and New York.

13. Defendant ACE American is a corporation formed under the laws of the state of Pennsylvania, having its principal place of business in Pennsylvania, and is a citizen of Pennsylvania.

14. Defendant QBE is a corporation formed under the laws of the state of Pennsylvania, having its principal place of business in New York, and is a citizen of both Pennsylvania and New York.

15. “[F]raudulently joined defendants will not defeat removal on diversity grounds.” *Valencia v. Sharp Elecs. Corp.*, 561 F. App'x 591, 593 (9th Cir. 2014) (quoting *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)). A removing party can establish fraudulent joinder if the plaintiff fails “to establish a cause of action against the non-diverse party in state court.” *Id.* (quoting *Hunter v. Philip Morris*, 582 F.3d 1039, 1044 (9th Cir.2009)).¹

16. AIG Claims was improperly joined as the Complaint cannot establish a cause of action against AIG Claims that would entitle Stillwater to relief. Stillwater alleges claims against AIG Claims for breach of the duty to defend, breach of contract, and violations of the UTPA. Stillwater’s claims for breach of the duty to defend and breach of contract are alleged against insurers as parties to the relevant insurance policies and arise out of those policies. Compl. ¶ 66 (“An *insurer* owes a duty to defend . . .” (emphasis added)); ¶ 75 (“Pursuant to the Policies, each Defendant owes a duty to defend and indemnify Stillwater”); ¶ 76 (“Each policy of insurance contains an implied covenant of good faith and fair dealing”). AIG Claims is not an insurer, nor is it alleged to be so. To the contrary, AIG Claims is alleged to be “the authorized representative for National Union ... and the entity which handled and adjusted Stillwater’s claim on behalf of National Union.” Compl. ¶ 2.

¹ Fraudulent joinder can also be established by showing actual fraud in the pleading of jurisdictional facts, which is not alleged here.

AIG Claims also is not a party to the National Union, ACE American, or QBE policies under those policies' plain terms. *See* Exs. 1-3. AIG Claims thus cannot be liable for any breach of a duty to defend or any breach of any of the policies.²

17. Stillwater also alleges that AIG Claims and the insurer Defendants are liable for violations of the UTPA pursuant to § 33-18-242, MCA. That provision of the UTPA provides an independent cause of action, but only against *insurers*. *See* § 33-18-242, MCA. As Montana case law, including the cases that Stillwater cites, makes clear, parties cannot bring statutory claims under the UTPA against claims adjusters. *See, e.g., O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 243, 859 P.2d 1008, 1014 (1993) (“[T]he statutory cause of action provided for in § 33–18–242, MCA . . . appl[ies] only to insurers as defined in § 33–1–201(6).”). As noted, however, AIG Claims is not an insurer. Stillwater therefore cannot establish a cause of action against AIG Claims.

18. Thus, because the citizenship of AIG Claims should be disregarded, pursuant to 28 U.S.C. §§ 1441 and 1332, complete diversity of citizenship exists.

19. Further, the Complaint seeks damages including Settlement Interest of approximately \$120,000, Statutory Interest Payment of \$7,904,482.65, and an

² *See also* Compl., *Stillwater Mining Co. v. National Union Fire Ins. Co. of Pittsburgh Pa., ACE American Ins. Co., QBE Ins. Co., Axis Ins. Co, Berkley Ins. Co, Navigators Ins. Co, and Continental Casualty Ins. Co.*, Case No. N20-C-04-190 (Del. Super. Ct. Apr. 22, 2020) (Trans. ID 65571966); [Proposed] Amended Compl., *Stillwater Mining Co. v. National Union Fire Ins. Co. of Pittsburgh Pa., ACE American Ins. Co., QBE Ins. Co.*, Case No. N20-C-04-190 AML CCLD (Del. Super. Ct. Dec. 21, 2020).

Interest Award of \$3,472,920.99 (totaling \$11,498,403.60), Compl., Relief ¶¶ 1-4, in addition to an unspecified amount of defense costs incurred in the underlying action, and exclusive of any claim for costs and attorneys' fees in this action. Stillwater alleges that the damages incurred exceed \$20,000,000. Compl. ¶ 66. The amount in controversy therefore exceeds \$75,000.

20. There are no other properly joined defendants that are required to consent to removal. Although not required as they are not a properly joined party, AIG Claims also consents to removal.

21. National Union, ACE American, and QBE will promptly file a Notice of Filing of this Notice of Removal with the clerk of the Twenty-Second Judicial District Court in Stillwater County, Montana and will serve the same on Plaintiff.

22. By filing this Notice of Removal, National Union, ACE American, and QBE are not waiving, and expressly reserve, the right to assert any defense or motion available in this action after it is removed to this Court.

23. By reason of the foregoing, this matter may be removed to this Honorable Court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

WHEREFORE, National Union, ACE American, and QBE respectfully request that this action now pending against it in the Twenty-Second Judicial District Court in Stillwater County, Montana be removed to this Honorable Court.

DATED this 11th day of January, 2021.

MATOVICH, KELLER & HUSO, P.C.

By: /s/ Katherine S. Huso
Carey E. Matovich
Katherine S. Huso
*Attorneys for AIG Claims, National
Union, and QBE*

DATED this 11th day of January, 2021.

BERG LILLY, P.C.

By: /s/ Elizabeth W. Lund
Elizabeth W. Lund
Attorney for ACE American

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2021, a copy of the foregoing was served on the following persons by the following means:

| | | | |
|-------------------|---------------|-------------------|----------------------------|
| <u>1</u> | CM/ECF | <u> </u> | Fax |
| <u> </u> | Hand Delivery | <u> </u> | Email |
| <u>2-3</u> | Mail | <u> </u> | Overnight Delivery Service |

1. Clerk, U.S. District Court, Billings Division

2. Martha Sheehy
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ATTORNEY FOR PLAINTIFF

3. Kyle A. Gray
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MATOVICH, KELLER & HUSO, P.C.

By: /s/ Katherine S. Huso
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